SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1093

BEST MEDIUM PUBLISHING CO. INC.,
Petitioner,

v.

MELVIN VARNISH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions Below

The opinion of the Court of Appeals (Appendix A) is reported at — F. 2d — (12/31/68).

The opinion of the United States District Court of New York for the Southern District is not reported and is set forth in Appendix B.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on December 31, 1968. (R. 626)*

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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* References to the Record are designated "R".

Constitutional Provision Involved

United States Constitution, Amendment I:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . . "

Questions Presented

1. Is the published article upon which suit was brought herein entitled to the protection of the First Amendment to the United States Constitution?

2. Did the Court of Appeals below correctly apply Pennsylvania law?

3. Was there sufficient evidence on the record to establish that the article contained materially false statements as to respondent?

4. Assuming that the article contained some false statements as to respondent, was there substantial evidence on the record to establish that they were published with actual malice?

Statement

On or about March 8, 1964, the petitioner, Best Medium Publishing Co. Inc., published in its weekly publication, *The National Enquirer* (hereinafter *"Enquirer"*), an article which described how the respondent's wife, Joanne Varnish, suddenly killed their three children and then committed suicide in their home in Concord, California on the night of September 27, 1963 (Pl. Ex. 1; the article is also

reproduced in footnote 1 of the Court of Appeals' opinion, App. A2-3).*

The respondent contends that the article invaded his right of privacy. His amended complaint alleges no special damages but claims $3. million in general damages. There is no prayer for relief for punitive or exemplary damages (R. 337).

Plaintiff's residence at the time of the publication of the article was in Pennsylvania and, upon the trial, the parties stipulated that the case would be governed by the law of that State.

Because the alleged falsities of the article, insofar as they relate to Mr. Varnish, are crucial to the determination of this case, it is necessary to refer to the testimony of Mr. Varnish upon his cross-examination to determine whether the article contained material falsities about him (R. 48-72).

> (a) When asked whether the reference to him as being a "good husband" was true or false, Mr. Varnish said it was "true". (R. 50)
>
> (b) When asked whether "things always ran smoothly in his household", Mr. Varnish testified "By and large, yes". (R. 51)
>
> (c) When asked whether he and his wife had enjoyed bowling together "for years", Mr. Varnish testified they were only bowling in their "second year". (R. 52-53)
>
> (d) Mr. Varnish testified that the date reported in the article to be the date of the tragedy was false and was in fact "September 27". (R. 55)

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* References to the Appendix are designated "App.".

(e) Mr. Varnish testified that the language attributed to Mrs. Varnish in saying "goodnight" before he left to go bowling was different from his own recollection (R. 55-56). Actually, it does accord with the report of that conversation as it was furnished by Mr. Varnish to Sgt. Gardella (Pl. Ex. 2, see also Pl. Ex. 6).

(f) The article describes Mr. Varnish as "racing through the house" upon his return home from the night of the tragedy. He claimed upon trial that this was false in that he only "ran" through the house. (R. 58-61)

(g) The article attributed to Mr. Varnish the following statement:

> "I can't understand it. We had no troubles, no troubles at all. We were happy."

Mr. Varnish testified that he didn't know for sure what he had said. (R. 65-66)

(h) The article further read:

> "Varnish broke into tears, went from child to child, kissed each on the head and sobbed:
>
> " 'We'll have to forgive her. We'll have to forgive her.' "

Varnish testified that he "could have said that." (R. 68)

(i) In concluding the article stated:

> ". . . [I]t would be easier for Varnish if he could only understand why the happiest wife and mother in the neighborhood suddenly decided to kill her three children and herself."

Varnish testified that:

> "This implies that I don't know my wife, that I don't care, that I don't love my children. This summarizes this whole thing up." (R. 69)

Respondent was then asked: ". . . Did you understand why your wife had killed herself? Did you know then, at that time?"

He answered: "I don't know to this day why my wife would kill herself. How would I know then?" (R. 70)*

Thus, by his own testimony, the plaintiff has admitted the truth of the concluding paragraph of the article.

Assuming that the article was materially false as to respondent, it was still incumbent upon him to establish that the article was published with knowledge that it was false or in reckless disregard for the truth. At the trial petitioner's sole witness, James Donahue, testified that in writing the article he relied on the news items which had appeared in other newspapers (Pl. Ex. 6; Dft. Ex. B), the police report (Pl. Ex. 2), and the coroner's report (Dft. Ex. C) (R. 104-135). A comparison of the language of the article (Pl. Ex. 1) and the said police report, especially, shows that Mr. Donahue followed this account of the known facts. Exercising such reasonable latitude as the author of any article may do, he omitted only those references from his article which might be deemed to have been uncomplimentary to or critical of the plaintiff (R. 127-131).

Thus, Mr. Donahue testified:

> "A. In the circumstances, I think it is an exceptionally nice story.
>
> "Q. Wasn't this written this way to get the feeling of irony? Isn't that the policy of— A. This is getting the feeling of the tragedy of the thing, which it really was.
>
> "Q. You think this got across the feeling of tragedy rather than the feeling of 'Isn't that pe-

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* The San Francisco *Examiner* on September 28, 1963, reported an interview with Varnish in which it reported that he said "he knew of no reason for the triple murder and suicide." (Pl. Ex. 6; see also Dft. Ex. B)

culiar?' A. No. I think that is much better than to say somebody was an unhappy person and she hated her husband and everything else. Do you think that's nice?

"Q. And your conclusion is that this is a fair appraisal of what happened? A. I tried to write a nice story.

"Q. You tried to write a nice story? A. That is right.

"Q. Did you try to write a truthful story? A. Under the circumstances, yes. Truthful. She killed herself.

"Q. And because she killed herself— A. I tried as much as I could to take the sting out of it." (R. 130-1)

It is submitted that the record is devoid of any substantial evidence proving that petitioner published the article with "malice" or with "calculated falsehood".

Upon completion of the respondent's case, the petitioner moved for a judgment for a directed verdict. Hon. Lloyd F. MacMahon, the Trial Judge, reserved decision. The jury, thereafter, brought in a verdict in favor of the respondent and awarded him $5,000. in compensatory damages and $15,000. in punitive damages. The petitioner then moved for judgment notwithstanding the verdict. Again, Judge MacMahon reserved decision. Thereafter by an order dated March 14, 1968, both motions of petitioner for a directed verdict and for judgment notwithstanding the verdict were denied. (R. 524 and App. B) Judgment accordingly in favor of the respondent was ordered, adjudged and decreed and so entered on March 15, 1968. (R. 527)

The Court of Appeals, per Chief Judge Lumbard, affirmed the judgment of the district court (App. A1-7), with Circuit Judge Hays dissenting (App. A7-8).

Basis for Federal Jurisdiction in the Court of First Instance

Jurisdiction was conferred upon the district court by 28 U.S.C. §1332(a)(1).

Reasons for Granting the Writ

The Court of Appeals' opinion clearly establishes that the *Enquirer* article dealt with a matter of "public interest." That Court held:

> "While the scope of 'matters of public interest' has not yet been clearly defined, it cannot be doubted that the subject of the Enquirer article, a murder-suicide, is within that category. Cf. *Time, Inc.* v. *Hill, supra,* 385 U.S. at 388; *Jenkins* v. *Dell Publishing Co., supra,* 251 F. 2d at 450-52; Restatement (2d) Torts §652 F (Tent Draft No. 13, 1967)." (App. A4-5)

Having held that the subject article involved a matter of public interest, the Court recognized that "it was incumbent upon the plaintiff to establish that the article was false and that it was published with knowledge that it was false or in reckless disregard for the truth." (App. A5) The Court of Appeals was thus restating the rule first announced by this Court in *New York Times, Co.* v. *Sullivan,* 376 U.S. 254 (1964), and as thereafter applied in *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967). And in referring to *Time, Inc.,* the Court of Appeals stated:

> "[T]he United States Supreme Court held that First Amendment guarantees of speech and press forbid recovery, absent a showing of 'knowing falsity or reckless disregard for the truth,' in privacy actions involving 'matters of public interest.'" (App. A4)

However, the Court of Appeals unfortunately erred in two material respects. First, in determining whether the article was false in any material respect, the Court incorrectly applied Pennsylvania law. In holding that the article's characterization of Mrs. Varnish as a "happy woman" was false it is respectfully submitted that this untrue characterization of Mrs. Varnish could not be the predicate upon which her husband could mount his claim for invasion of *his* privacy, especially since he had admitted the truth of all material statements and acts attributed to him. Secondly, the Court erred in its finding that the respondent proved (a) that the article was materially false as to him; and (b) that there was substantial evidence that the petitioner published the article with malice.

Pennsylvania law

In Pennsylvania, the right of privacy rests on common law, *Aquino* v. *Bulletin Co.*, 190 Pa. Super. 528, 154 A. 2d 422 (1959). In *Aquino,* the plaintiffs, parents of a daughter who was secretly married and then shortly thereafter divorced, sued to recover damages for invasion of their privacy allegedly caused by defendant's publication of a comparatively lengthy article naming plaintiffs and attributing to them certain actions and statements. The plaintiffs also complained that the illustration of a man and woman appearing above the article which purported to be that of plaintiffs' daughter Theresa and her husband did not in fact resemble them and that this also unlawfully invaded their privacy. The court in refuting this contention held:

> "The action is a personal action and the defendant is not liable to appellees [plaintiffs] for what it related about Theresa [daughter] but only what it related about them" (154 A. 2d at 430)

Therefore, even assuming that the characterizations of Mrs. Varnish were false, they would not serve as a basis for Mr. Varnish's action for the invasion of *his* privacy.

The court in *Aquino,* permitted plaintiffs to recover for invasion of their privacy giving as its reasons the fact that (a) the article was published for commercial purposes noting that the article appeared in defendant's "Sunday supplement"; (b) the article contained fictionalized statements and actions attributed to plaintiffs; and (c) the article clearly went beyond the limits of decency.

It is indeed doubtful in light of this Court's holding in *Time, Inc.* v. *Hill, supra,* that a publication for commercial purposes will defeat the constitutional protection of the First Amendment. In that connection this Court in *Time, Inc.* cited with approval the following:

> " 'That books, newspapers and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.' *Joseph Burnstyn, Inc.* v. *Wilson,* 343 U.S. 495, 501-502, 72 S. Ct. 777, 780, 96 L. Ed. 1098; see *New York Times, Co.* v. *Sullivan,* 376 U.S. at 266. . . ." (385 U.S. at 397)

An examination of the lengthy article in *Aquino* (154 A. 2 at 428-29, footnote 2), adequately demonstrates the reason for that court's holding. In comparison, one must search in vain for anything in the *Enquirer's* article (Pl. Ex. 1) that appears to be improper or indecent. Circuit Judge Hays in his dissenting opinion below held that:

> "Even if it be assumed that the article contains some false statements and that they were published knowingly or recklessly, there is *nothing in the statements*

> *as to the plaintiff* which is so offensive as to justify the verdict. That the article is in bad taste is not sufficient. It clearly does not go 'beyond the limits of decency,' as it must if plaintiff is to recover. See *Aquino* v. *Bulletin Co.*, 190 Pa. Sup. 528 (1959)." (App. A8; emphasis added)

One may easily conclude that the article is warm, gentle and sympathetic.

However, it is apparent from *Aquino* that this *mores* test is only relevant once it is decided that a publication is not constitutionally protected.

Aquino also held that the subjects of marriage and divorce are matters of "public interest," and the defendant was privileged to name plaintiffs and give their address even though the public record of the divorce only referred to them as the "parents". That court recognized that a publisher of a magazine or a newspaper has the privilege of publishing not only about those who are "public figures" but also about those obscure persons whom events have catapulted into public limelight. The court stated:

> "One who unwillingly comes into the public eye as in the case of a criminal, . . . or the subject of a striking catastrophe, is subject to the limitations on his right to be let alone. Both groups of persons are the objects of legitimate public interest during a period of time after their conduct or misfortune has brought them to the public attention. Publishers are privileged to satisfy the curiosity of the public as to their leaders, heroes, villains and victims." (152 A. 2 at pp. 425-26)

The *Aquino* court noted with approval the holding in *Jenkins* v. *Dell Publishing Co.*, 251 F. 2d 447 (3rd Cir., 1958), cert. den. 357 U.S. 921 (1958). Reference to that case is

merited not only because it is so similar to the case at bar, but because the holding therein appears to be in conflict with the opinion in the Court of Appeals below.

*Jenkins** was a case in which defendant had published in its monthly magazine, "Front Page Detective," a photograph of a family of a homicide victim some four or five months after the event was reported in the newspapers. Recognizing that there is a protected area of privacy under Pennsylvania law, however "imprecisely defined," the court affirmed an order granting the defendant summary judgment and observed:

> "... the interest of the public in the free dissemination of the truth and unimpeded access to news is so broad, so difficult to define and so dangerous to circumscribe that courts have been reluctant to make such factually accurate public disclosures tortious, except where the lack of any meritorious public interest in the disclosure is very clear and its offensiveness to ordinary sensibilities is equally clear." (p. 450)

The court also refused to look upon the publication of the tragic incident as a "commercial use." It completely discounted the appellants' principal contention that the publication was not entitled to the privileged status of ordinary

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* Prior to the commencement of this action in the District Court below, Varnish instituted a similar action against the *Enquirer* in the United States District Court for the Western District of Pennsylvania (Civil Action No. 64-401). The complaint was dismissed for lack of jurisdiction. Although the merits were briefed by both sides, dismissal for lack of jurisdiction prevented the court from effecting a substantive dismissal also. Nevertheless, the court stated:

> "... it is suggested to plaintiff's counsel that he carefully examine the Court of Appeals' decision in this Circuit, *Jenkins* v. *Dell Publishing Company,* 251 F. 2d 447, (1958). From that opinion it does not appear in any event that the plaintiff can succeed in this District."

news items because of any alleged intended appeal to satisfy a public craving for "entertainment" rather than to provide information. The court further observed:

> "A large part of the matter which appears in newspapers and news magazines today is not published or read for the value or importance of the information it conveys. Some readers are attracted by shocking news. Others are titillated by sex in the news. *Still others are entertained by news which has an incongruous or ironic aspect.* Much news is in various ways amusing and for that reason of special interest to many people. Few newspapers or news magazines would long survive if they did not publish a substantial amount of news on the basis of entertainment value of one kind or another. This may be a disturbing commentary upon our civilization, but it is nonetheless a realistic picture of society which courts shaping new juristic concepts must take into account. In brief, once the character of an item as news is established, it is neither feasible nor desirable for a court to make a distinction between news for information and news for entertainment in determining the extent to which publication is privileged." (p. 451; emphasis supplied)

In referring to defendant's magazine the court stated:

> "While it is not an intellectual or educational publication and would hardly be characterized as appealing to 'elevated tastes', we find nothing in it which could fairly be characterized as disgusting, or indecent, or appealing to 'depraved tastes'. A jury should not be permitted to find an otherwise privileged publication to be tortious because it appears in such an environment as this magazine provides." (p. 452)

The foregoing case would appear to be on all fours with the case presently at bar, both as to the substance of the

articles and the time lapse between the occurrence of each event and its subsequent publication.

Therefore, even assuming that the *Enquirer's* article was *ironic*, as contended by respondent (see Court of Appeals' opinion—App. A4), this in and of itself would not defeat the publication's privileged status. Moreover, it is submitted that the Court of Appeals erred in attributing any significance to the supposed commercial motive of petitioner for its failure to print the entire suicide note of Mrs. Varnish. (App. A5, footnote 4). *New York Times* v. *Sullivan, supra,* at p. 266.

In addition, the *Aquino* court cited with approval *Metter* v. *Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P. 2d 491 (1939), in which the plaintiff's name was used in a newspaper report of the facts surrounding his wife's suicide. The court affirmed the dismissal of the complaint, stating, in part:

> " . . . no reference was made to him in the printed newspaper article, except that he was [the] husband and that he was quoted with reference to the causes to which he ascribed his wife's suicide." (p. 495)

The court took pains to point out also that suicides become a matter of investigation by the coroner, whose report is thereby a public record, citing *Melvin* v. *Reid*, 112 Cal. App. 285, 297 P. 91 (1931); California Code, § 27491.

Failure of proof that article is materially false as to respondent and failure of proof of calculated falsehood.

The petitioner's constitutional rights hinge upon an implication. Mr. Varnish contends that the article:

> "*implies* that I don't know my wife, that I don't care, that I don't love my children. This summarizes this whole thing up." (Tr. 69; emphasis added)

A person reading this article will no doubt find it very difficult indeed to arrive at such an implication unless it was suggested to him by Mr. Varnish.

Mr. Varnish testified that he did not understand why his wife had killed herself. (R. 70). In addition, an article in The San Francisco *Examiner* on September 28, 1963, reported an interview with Mr. Varnish in which it reported that he said "he knew of no reason for the triple murder and suicide". (Pl. Ex. 6; see also Dft. Ex. B). That same article was used by Mr. Donahue in writing the *Enquirer* article. (R. 114)

Judge Hays in his dissenting opinion below summarizes Mr. Varnish's case and its lack of merit as follows:

> "Plaintiff's entire argument rests, as the majority indicates, on the theory that the story portrayed him in a false and unsympathetic light by implying that he was lacking in sensitivity and understanding. He objects particularly to the statement in the article that he did not understand why his wife had killed herself. But plaintiff testified that he did not understand why his wife had killed herself and that he could not swear that he had not told the investigating police about his inability to understand.
>
> "If the omitted part of the suicide message had been included, the story would have been more accurate but it would not have reflected plaintiff in any better light.
>
> "The irony of the description of the wife as happy cannot properly be held to justify withdrawal of constitutional protection." (App. A7-8)

Line-by-line, paragraph-by-paragraph, interrogation of Mr. Varnish failed to elicit any material falsehood or substantial inaccuracy relating to Mr. Varnish in the published article. (R. 48-72) Judge Hays in his dissenting opinion stated:

> "I cannot agree with the majority's conclusion that the Enquirer article is materially false." (App. A7)

Moreover, minor inaccuracies and fictionalized dialogue will not alone defeat the constitutional protection afforded to publications dealing with matters of public interest. *Spahn* v. *Julian Messner, Inc.*, 18 N.Y. 2d 877 (1966), vacated and remanded, 387 U.S. 239, rearg., 21 N.Y. 124 (1967), probable jurisdiction noted, 37 U.S. Law Week 3133 (Oct. 14, 1968); *Kousscvitzky* v. *Allen, Towne & Heath*, 188 Misc. 479, 68 N.Y.S. 2d 779 (Sup., 1947), aff'd 272 App. Div. 759, 69 N.Y.S. 2d 432 (1st Dept., 1947).

In the absence of a showing that the article is materially false as to respondent, the article is protected by the First Amendment Immunity, and it cannot be subjected to any sanctions that may be construed to be applicable by reason of Pennsylvania doctrines of invasion of privacy. *Time, Inc.* v. *Hill, supra.*

What Mr. Varnish's action for the alleged invasion of his privacy boils down to is Mr. Donahue's reluctance and failure to tell the world how difficult Mrs. Varnish found her life with her husband to be. What Mr. Varnish is urging is that the publisher had a duty to describe the contents of the entire suicide note and that the omission of Mrs. Varnish's uncomplimentary description of her marriage with respondent was a tortious act.

A publisher is not a witness who has sworn to "tell the truth, the whole truth and nothing but the truth." A newspaper account or a magazine report of an event such as the Varnish tragedy is not to be measured by judicial standards of the elements of the crime of perjury. Further, however, the publisher may be selective in what he chooses to publish concerning the contents of a document such as Mrs. Varnish's letter. Certainly, he should have the right to refrain from having to mention the portions of such a letter which he considers offensive and uncomplimentary and clearly of no essential significance to the article he is publishing. Such selectivity is a necessary and legitimate attribute of the literary and publishing art. The First Amendment protection of freedom of press involves not only the right to report the news, but also the right to analyze and characterize.

Much reliance is placed upon the characterization of the late Mrs. Varnish as "the happiest woman in the neighborhood." Clearly, only Mrs. Varnish could have complained of that characterization and it is hardly reasonable that she would have or, that, having complained about it she could have had a cause of action against the defendant therefor. Certainly, the use of that language could not inure to the benefit of the respondent in the within action. Moreover, the police report makes reference to a neighbor, one Robert Maruska, as having stated that the family "get along well." (Pl. Ex. 2, p. 5). This also was the view of another neighbor, one Mr. Tramell (Pl. Ex. 2, p. 5). One news article (Dft. Ex. B) quotes the respondent as having said, "I can't explain it; we had no difficulties." Another article (Pl. Ex. 6) stated that the respondent knew of no reason for the tragedy.

As a matter of fact, the respondent himself testified on cross-examination that, by and large, things ran smoothly

in his household and there were certain times when his wife was bright and cheerful. (R. 50-52)

In view of the foregoing, it is evident that the published article was not known by the respondent to be false or that it was published with a reckless disregard for the truth. Such speculation as to the cause of the tragedy was certainly reasonable and well within the ambit of literary license.

Libel cases recently decided by this Court have provided "meaningful guidance" for ascertaining the definition of "reckless publication". Thus, *New York Times, Co.* v. *Sullivan,* 370 U.S. 254 (1964), denied recovery to a plaintiff because the record did not manifest that the publisher was aware of the likelihood that he was circulating false information. *Garrison* v. *Louisiana,* 379 U.S. 64, 74-75 (1964), emphasized the necessity for the evidence to show that the false publication was made with a "high degree of awareness" and that the constitutional protection afforded a publication will yield only upon proof of "calculated falsehood". In *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 153 (1967), Mr. Justice Harlan, stated that evidence of either deliberate falsification or reckless publication "despite the publisher's awareness of probable falsity" was essential to recovery by public in defamation articles. And in *St. Amant* v. *Thompson,* 390 U.S. 727, 736, (1968) this Court concluded that,

> "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be *sufficient evidence* to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." [emphasis added].

Cf. *Pickering* v. *Board of Education,* 391 U.S. 563, 573-575 (1968).

And, as was noted above (p. 7), this same "standard" was extended by this Court in invasion of privacy cases. *Time, Inc.* v. *Hill, supra,* 385 U.S. 374, 387-88.

Upon his cross-examination, Varnish was repeatedly requested to single out and identify specific material falsities in the article concerning *himself* and he utterly failed to do *so.* (See pp. 3-5, *supra*) He regarded the characterization of his wife as "happy" or "happiest," to be false and, in the omission of the publisher to publish all the contents of her "death note" and thereby dredge up for public view all of the unpleasant details of his marriage, Varnish urged that the article

> "*implies* that I don't know my wife, that I don't care, that I don't love my children. This summarizes this whole thing up." (R. 68; emphasis added)

In essence, the respondent's argument is a paradox: the considerate reluctance of the publisher to "invade the privacy" of his personal life constituted an invasion of his privacy. The publisher is to be damned for what it commendably refused to do.

So far as what was actually stated in the article, however, it is clear that in all those respects there was no meaningful or substantial departure from the truth.

If the judgment below is allowed to stand, a newspaper or magazine article may be attacked as deliberate fabrication whenever mere error occurs (however innocent) or whenever editorial or literary license or sheer space limitations omit assorted details and references, even offensive

ones, and the publisher thereby subjected to liability for invasion of privacy.

The tragic murder and suicide affecting Varnish's family were a legitimate area for inquiry by the publisher here into an all too common social malaise—a proper subject for an account of human plight and the attempt to escape one's problems.

Out of the welter of words used to describe this litigation about a nondefamatory publication, there remains one simple incontrovertible fact: a substantial connection between the tragic event and the article itself. In the absence of substantial evidence of intentional fabrication or a reckless disregard of truth, the article is endowed with the privilege of publication by the First Amendment.

To require the press to be totally accurate at its peril is precisely the kind of "self censorship" that was condemned in *New York Times Co.* v. *Sullivan,* 376 U.S. 254. That case dealt with freedom of the press in the context of libel. The law of privacy is the analog to defamation and is as focal to free press consideration as the problem posed in the *Times* case. In *Times,* the court emphasized that the constitutional protection does not turn on the truth, popularity or social utility of the ideas and beliefs published. It pointed out that Madison had once declared:

> "Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press." (at p. 271)

Certainly the story of a multiple murder and suicide can be equated with the subject matter of the article which appeared in *Life* Magazine for which suit was brought in *Time,*

Inc. v. *Hill, supra.* As Mr. Justice Brennan so aptly observed in that case,

> "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' *Thornhill* v. *Alabama,* 310 U. S. 88, 102. 'No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression.' *Bridges* v. *California,* 314 U. S. 252, 269. . . . 'The line between the informing and the entertaining is too elusive for the protection of . . . [freedom of the press]. '*Winters* v. *New York,* 333 U. S. 507, 510. Erroneous statement is no less inevitable in such a case than in the case of comment upon public affairs, and in both, if innocent or merely negligent, '. . . it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive" . . .' *New York Times Co.* v. *Sullivan, supra,* at 271-272." (p. 388)

And his Honor further observed:

> "We create a grave risk of serious impairment of the indispensable service of free press in a free

> society if we saddle the press with the impossible burden of verifying to a certainty the facts associated with a person's name . . . particularly as related to nondefamatory matter." (p. 389)

In his concurring opinion, Mr. Justice Black described *Life's* conduct as "at most a mere understandable and incidental error of fact in reporting a newsworthy event." He went on to state at pp. 400-401:

> "One does not have to be a prophet to foresee that judgments like the one we here reverse can frighten and punish the press so much that publishers will cease trying to report news in a lively and readable fashion as long as there is—and there always will be—doubt as to the complete accuracy of the newsworthy facts.[3] Such a consummation hardly seems consistent with the clearly expressed purpose of the Founders to guarantee the press a favored spot in our free society."

"[3] See, for example, *Curtis Publishing Co.* v. *Butts,* 351 F. 2d 702 ($3,000,000 libel judgment, cut to $460,000 on appeal), cert. granted, *post,* p. 811; *Associated Press* v. *Walker,* 393 S. W. 2d 671 (Tex. Civ. App.) ($500,000 libel judgment), cert. granted, *post,* p. 812; *New York Times Co.* v. *Sullivan,* 376 U. S. 254 ($500,000 libel judgment), reversed."

While concurring with the result, Mr. Justice Black foresaw grave consequences in the engrafting of any limitations upon the freedom of press in light of the clear mandate of the First Amendment.

Finally, one may consider the admonitions of Mr. Justice Douglas in the same case where, in his concurring opinion, he expressed the view that he was loath even to have fictionalization arm a plaintiff with a cause of action because, likening fictionalization to a water color, he looked upon it

as narrowing the ambit of the First Amendment, imperiling creative writing, and producing a "chilling effect" on free expression. Mr. Justice Douglas opposed recognition of fictionalization or "knowing or reckless falsity" as exceptions to the rights of a free press because such exceptions provide a jury with "almost unfettered discretion."

Mr. Justice Douglas further observed, in connection with the tragic incident that befell Mr. Hill and his family, the following:

> "Here a private person is catapulted into the news by events over which he has no control. He and his activities are then in the public domain as fully as the matters at issue in *New York Times, Co.* v. *Sullivan.* . . . Such privacy as a person normally has ceases when his life has ceased to be private." (p. 402)

In the case at bar, there was no substantial proof of either fictionalization or knowing or reckless falsity. All the more in point, therefore, is Mr. Justice Douglas' observation:

> "A trial is a chancy thing, no matter what safeguards are provided. To let a jury on this record return a verdict or not as it chooses is to let First Amendment rights ride on capricious or whimsical circumstances, for emotions and prejudices often do carry the day." (p. 402)

As Judge Hays stated below:

> "The news media must be allowed wide leeway in deciding what they will report and how they will report it." (App. A8)

CONCLUSION

The majority opinion of the Court of Appeals has in effect created a new exception to a publisher's right of freedom of press. That Court has held that a plaintiff may recover in an action for invasion of privacy if a publication contains allegedly false statements about another person which may cast the plaintiff in an *ironic* light. This holding presages alarming consequences for press freedom. It would gravely impair that fundamental right by severely restricting the modes of journalistic and literary expression to the detriment of our free society. For this reason especially as well as for the reasons heretofore set forth, this petition should be granted.

Respectfully submitted,

KAUFMAN, TAYLOR, KIMMEL & MILLER
Attorneys for Petitioner

IRWIN M. TAYLOR
STUART NEWMARK
of Counsel

Proof of Service

I, Irwin M. Taylor, a member of the Bar of the Supreme Court of the United States and of counsel to attorneys for Petitioner, hereby certify that on the 27th day of February, 1969, I served copies of the foregoing petition for a writ of certiorari on the Respondent Melvin Varnish, by mail, by depositing three copies of same enclosed in a duly addressed and secured envelope in a United States mail box, with first class postage prepaid, addressed to Jaffe Cohen Berman & Crystal, Esqs., attorneys of record for Respondent Melvin Varnish, at 56 Pine Street, New York, New York 10005, that being their post office address indicated upon the last papers served by them.

/s/ Irwin M. Taylor
Irwin M. Taylor

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 107—September Term, 1968.

(Argued October 4, 1968 Decided December 31, 1968.)

Docket No. 32359

MELVIN VARNISH,

Plaintiff-Appellee,

—v.—

BEST MEDIUM PUBLISHING CO., INC.,

Defendant-Appellant.

Before:

LUMBARD, *Chief Judge,*
KAUFMAN and HAYS, *Circuit Judges.*

Appeal from a jury verdict of $5,000 compensatory and $15,000 punitive damages against defendant publishing company for invasion of privacy in a diversity case, Lloyd F. MacMahon, *J.*, Southern District of New York.

Affirmed.

ERNEST ALLEN COHEN (Jaffe Cohen Berman & Crystal, New York, N. Y. on the brief), *for plaintiff-appellee.*

IRWIN M. TAYLOR (Kaufman, Taylor, Kimmel & Miller, New York, N. Y. on the brief), *for defendant-appellant.*

Appendix A

LUMBARD, *Chief Judge*:

This appeal presents the difficult question of whether the appellant's article, "'Happiest Mother' Kills Her Three Children and Herself," was sufficiently untruthful and offensive to support a judgment for invasion of privacy.

In September, 1963, Melvin Varnish's wife killed their three infant children and committed suicide. In March, 1964, Best Medium Publishing Co., Inc. published an article in its weekly, *The National Enquirer*, purporting to describe Varnish's actions and reactions in connection with this tragedy.[1] The article was based upon previous news-

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[1] The article read as follows:

Mrs. Joanne Varnish was known as the happiest woman in the neighborhood.

She was young, pretty, had a good husband and three lovely children.

She was bright, cheerful and completely devoted to her family. Things always ran smoothly in the Varnish household.

So smoothly that more than one neighbor in their Concord, Calif., community said:

"Now, there's a model family. They're always so happy and contented and she's the happiest mother in the neighborhood."

Each week Mrs. Varnish 25, looked forward to going bowling with her husband, Melvin, 30, a successful auto salesman. They had been having fun doing it for years.

Then last November 27, their regular weekly bowling night, she told her husband that she didn't feel like going bowling, that she'd rather stay home for a quiet evening.

Then she said to him: "But you go along, dear, and have a good time.

"And don't worry about us, we'll all be fast asleep when you get home."

Varnish kissed her and left.

At 1 a.m. he returned home—and found the house empty.

He was racing through the house when he heard music coming from the garage.

He dashed to the garage. The music was coming from the car radio. He also found his wife and three children—Debra, 5, Mitchell, 4, and Danny, 20 months.

Mrs. Varnish had been right.

She and the children were all fast asleep—forever.

paper reports and police records which the author, James Donahue, had collected. On the basis of this article, plaintiff commenced this diversity action in the Southern District for invasion of privacy, claiming that the portrayal of his wife and his relationship with her was a complete fictionalization, invented by the defendant to give the story an ironic and sensational twist, and that the publication was offensive to community standards of decency. He alleged that the article caused him severe mental distress, loss of job opportunities and loss of friends.

The case was tried before a jury, which, after an instruction to which appellant made no objection, awarded

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Mrs. Varnish had attached a vacuum cleaner hose to the exhaust on the family car and then sat the children in the car.

She put the other end of the hose through a partially open window and then got in the car to wait for the fumes to put them all to sleep.

Danny was in the front seat with his mother.

Cuddled together in the back seat were Debra and Mitchell.

Varnish's anguished screams when he came upon the tragedy awakened the neighbors, and called the fire department.

Firemen worked vainly to revive them and then rushed them to a hospital.

While doctors continued desperate efforts to revive the mother and children, police found a note left by Mrs. Varnishfor her mother. It said:

"Just a note in explanation to let you know I am going to put the three children and myself to sleep forever. I can't go on."

It was an explanation that explained nothing least of all to the shocked Varnish.

He said: "I can't understand it. We had no troubles, no troubles at all. We were happy."

Three hours after the discovery of the tragedy, doctors finally gave up and pronounced the mother and children dead.

Varnish broke into tears, went from child to child, kissed each on the head and sobbed:

"We'll have to forgive her. We'll have to forgive her."

But it would be easier for Varnish if he could only understand why the happiest wife and mother in the neighborhood suddenly decided to kill her three children and herself.

plaintiff $5,000 compensatory[2] and $15,000 punitive damages. On appeal, appellant contends that there is insufficient evidence to support a finding of invasion of privacy under Pennsylvania and federal law,[3] and that therefore its motion for a directed verdict or its motion for judgment notwithstanding the verdict should have been granted. As we find appellant's contentions to be without merit, we affirm the judgment.

Although Pensylvania permits a tort action to redress unwarranted invasions of privacy, *Aquino* v. *Bulletin Co.*, 190 Pa. Supr. 528, 154 A. 2d 422 (1959), it recognizes that privacy actions must be carefully scrutinized in order to avoid interference with First Amendment guarantees of freedom of speech and press. *Aquino* v. *Bulletin Co., supra,* 154 A. 2d at 425; *Jenkins* v. *Dell Publishing Co.*, 251 F. 2d 447 (3d Cir. 1958), cert. den. 357 U. S. 921. Likewise, in *Time, Inc.* v. *Hill,* 385 U. S. 374 (1967), the United States Supreme Court held that First Amendment guarantees of speech and press forbid recovery, absent a showing of "knowing falsity or reckless disregard for the truth," in privacy actions involving "matters of public interest." While the scope of "matters of public interest" has not been clearly defined, it cannot be doubted that the subject of the Enquirer article, a murder-suicide, is within that category. Cf. *Time, Inc.* v. *Hill, supra,* 385 U. S. at 388; *Jenkins* v. *Dell Publishing Co., supra,* 251 F. 2d at 450-52;

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[2] Plaintiff at trial introduced evidence that as a result of the article he attempted suicide, suffered the need for psychiatric attention, suffered unemployment, was shunned in his community, and became the victim of severe mental suffering. Thus, there was ample evidence to support the jury's finding of compensatory damages. Cf. *Diapulse Corp.* v. *Birtcher Corp.*, 362 F. 2d 736 (2d Cir. 1966), cert. den., 385 U. S. 801.

[3] Since plaintiff was a resident of Pennsylvania at the time of the publication, the parties agreed that Pennsylvania law should apply. To the extent that freedom of the press is involved federal law is of course also relevant.

Restatement (2d) Torts §652 F (Tent. Draft No. 13, 1967). Thus it was incumbent upon the plaintiff to establish that the article was false and that it was published with knowledge that it was false or in reckless disregard for the truth. After a review of the entire record, we conclude that there was ample evidence for the jury to find, as it did, that the plaintiff has met this burden.

Appellant claims that there was no evidence that its article was false in any material respect. However, plaintiff contended at trial, as he does here, that the story cast him in a false and unfavorable light, that the "happy wife and mother" theme used throughout the article was fictitious and was intended to be ironic, to indicate plaintiff's insensitivity and lack of caring and understanding for his wife. The record shows that Mrs. Varnish, far from being the happiest mother, was in reality a despondent, depressed and extremely unhappy woman. The suicide note, which itself expressed her extreme unhappiness and which was in the author's possession, was quoted in the article in a somewhat distorted manner:

> ". . . police found a note left by Mrs. Varnish for her mother. It said:
>
> 'Just a note in explanation to let you know I am going to put the three children and myself to sleep forever. I can't go on.'
>
> It was an explanation that explained nothing, least of all to the shocked Varnish."

The actual note in fact explained the suicide more fully:[4]

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[4] Although appellant argues that only part of the letter was quoted because Donahue wanted to write a "nice story," it is apparent that had the entire note been printed, the "happiest mother" approach, the selling point, would have been impossible.

> "Just a note and explanation to let you know that I am going to put the three children and myself to sleep forever. I can't go on any longer. I see no future for the children or myself. Mitch [plaintiff] is impossible and this is the only way to get away from him. I've had a miserable life since the time I met him. Tell Uncle Chris and Uncle Butch I'm sorry about the money they each loaned me in 1961. . . . I owe so much I'll never have to bother anyone anymore."

The article also stated that "more than one neighbor" had said that Mrs. Varnish was the "happiest mother in the neighborhood," whereas the two neighbors' statements which were available to the author merely stated that the Varnishes "seemed to get along fairly well." The story also contained fictionalized dialogue and some minor inaccuracies. It concluded:

> " . . . it would be easier for Varnish if he could only understand why the happiest wife and mother in the neighborhood suddenly decided to kill her three children and herself."

Plaintiff at trial testified that his wife was not a happy person; he repeatedly testified, however, that he understood her and her problems, that they had a difficult life and that he did what he could for her.

We agree with the appellant that minor inaccuracies and fictionalized dialogue will not alone defeat the privilege granted to truthful publications of public interest. Cf. *Spahn* v. *Julian Messner, Inc.*, 18 N. Y. 2d 324 (1966), vacated and remanded, 387 U. S. 239, rearg., 21 N. Y. 124 (1967), probable jurisdiction noted, 37 U. S. Law Week 3133 (Oct. 14, 1968); *Koussevitzky* v. *Allen, Towne & Heath.*

Appellant also argues that there was no showing that the article was offensive to persons of ordinary sensibilities, as required by Pennsylvania law. Pennsylvania has held, however, in a case quite similar to this one, that this issue is peculiarly within the competence of the jury. *Aquino* v. *Bulletin Co., supra,* 154 A. 2d at 430. We cannot say as a matter of law that the Enquirer article would not be offensive to a person of ordinary sensibilities.

Were we to hold, as the appellant urges, that on this record the plaintiff was not entitled to recovery, there would be insufficient restraint on reckless, irresponsible, and untruthful journalism under the guise of freedom of the press. We think that the standards applied by the district court, which required intentional or reckless falsity and offensiveness to persons of ordinary sensibilities, represent a proper balancing of the public interest in freedom of expression and the individual interest in privacy.

The judgment is affirmed.

HAYS, *Circuit Judge* (dissenting):

I would reverse the judgment of the district court. I cannot agree with the majority's conclusion that the Enquirer article is materially false.

Plaintiff's entire argument rests, as the majority indicates, on the theory that the story portrayed him in a false and unsympathetic light by implying that he was lacking in sensitivity and understanding. He objects particularly to the statement in the article that he did not understand why his wife had killed herself. But plaintiff testified that he did not understand why his wife had killed herself and that he could not swear that he had not told the investigating police about his inability to understand.

If the omitted part of the suicide message had been included, the story would have been more accurate but it would not have reflected plaintiff in any better light.

The irony of the description of the wife as happy cannot properly be held to justify withdrawal of constitutional protection.

Even if it be assumed that the article contains some false statements and that they were published knowingly or recklessly, there is nothing in the statements as to the plaintiff which is so offensive as to justify the verdict. That the article is in bad taste is not sufficient. It clearly does not go "beyond the limits of decency," as it must if plaintiff is to recover. See *Aquino* v. *Bulletin Co.*, 190 Pa. Sup. 528 (1959).

The news media must be allowed wide leeway in deciding what they will report and how they will report it. See *St. Amant* v. *Thompson*, 390 U. S. 727 (1968); *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967); *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964).

APPENDIX B

Memorandum Opinion by MacMahon, *D.J.*

(R. 524) UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

MACMAHON, *District Judge.*

Viewing the evidence in a light most favorable to plaintiff, there clearly was an issue of fact as to which reasonable men might reasonable differ which required denial of defendant's motion for a directed verdict made at the close of plaintiff's case and renewed at the close of the entire case. We also conclude that there was sufficient evidence as a matter of law to justify the jury's verdict and its award of compensatory and punitive damages.

The parties stipulated that the case would be governed by Pennsylvania law. The court's charge to the (R. 525) jury was therefore based on *Acquino* v. *Bulletin Co.*, 190 Pa. Super. 528, 154 A.2d 422 (1959), as we believe the rule there enunciated would be modified by *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967), *Time, Inc.* v. *Hill,* 385 U.S. (1967), and *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964).

Clearly there was sufficient evidence for the jury to find that defendant's pubication did use the plaintiff's name and personality without his consent, that defendant's article was substantially false, that defendant either knew that the published article was substantially false or published it with

reckless disregard of its truth or falsity, that the defendant should have realized that the article would offend a person of ordinary sensibilities and outrage the community's sense of decency, that plaintiff did suffer damages as a proximate result of the publication, and that defendant's conduct was so wanton and reckless as to be without regard to the rights of the plaintiff or people in general. These facts clearly warrant both the jury's verdict in favor of the plaintiff and its award of compensatory and punitive damages. See *New York Times Co.* v. *Sullivan, supra*, as to compensatory (R. 526) damages, and *Curtis Publishing Co.* v. *Butts, supra*, as to punitive damages.

Under the circumstances, the jury's award of $5,000 compensatory damages is reasonable, and its award of $15,000 punitive damages is not excessive. The jury could reasonably conclude, in view of a finding of outrage to the community's sense of decency, that publication of such stories and pseudo-reporting should be penalized in order to curtail repetition of the practice in the future.

Accordingly, defendant's motion for a judgment in accordance with its motions for a directed verdict and for judgment notwithstanding the verdict is denied. The Clerk is directed to enter judgment for the plaintiff in accordance with the jury's verdict.

So ordered.

Dated: New York, N. Y.
March 14, 1968

/s/ LLOYD F. MACMAHON
United States District Judge